Supreme Court of the United States.

OCTOBER TERM, 1945.

HERBERT O. DUNN AND JOHN A. CADARIO,
Petitioners,

v.

TOWN OF BURLINGTON,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.
Opinion of the Court Below.

The opinion of the Supreme Judicial Court of Massachusetts appears in the 1945 Massachusetts Advance Sheets, pp. 597-604. It is printed in the Record at pp. 13-19.

II.
Jurisdiction.

The opinion of the Supreme Judicial Court was entered on May 7, 1945 (Rec. p. 13). Final decree of the Middlesex Superior Court was entered June 11, 1945 (Rec. p. 20). The jurisdiction of this court is invoked under Judicial Code, § 237, as amended, 28 U.S.C. § 344(b).

III.
Statement of the Case.

As stated in the petition, the question presented is whether the Massachusetts Legislature, in delegating to cities and towns the right to pass zoning by-laws regulating the use of land, could, without violating the 14th Amendment to the Federal Constitution, authorize a regulation of the use of land which results in prohibiting the owner of the land from removing the loam or topsoil therefrom for sale or otherwise.

IV.
Specification of Errors.

The petitioners contend that the Supreme Judicial Court of Massachusetts erred in ordering a decree restraining your petitioners from removing loam or topsoil from their land, for the reason that no state, nor its subdivisions, has a right to interfere with property solely for aesthetic reasons, in that interference for such reasons violates the 14th Amendment to the Federal Constitution.

V.
Argument.

IF THE ZONING BY-LAW OF THE RESPONDENT TOWN OF BURLINGTON IS INTERPRETED TO MEAN THAT UNDER ITS PROVISIONS A LANDOWNER CANNOT REMOVE THE LOAM AND TOPSOIL FROM HIS PREMISES FOR SALE OR OTHERWISE, THEN THE ZONING BY-LAW AS THUS INTERPRETED IS UNCONSTITUTIONAL AS BEING A VIOLATION OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION.

The Supreme Judicial Court of Massachusetts in passing upon the question now presented pointed out, at page

600 of the opinion in the 1945 Massachusetts Advance Sheets, that this Honorable Court has many times passed upon the constitutionality of zoning by-laws. See, for example:

Zahn v. *Board of Public Works,* 274 U.S. 325.
Nectow v. *Cambridge,* 277 U.S. 183.

The Massachusetts court in its opinion, however, further points out at page 600 of the 1945 Massachusetts Advance Sheets:

> "It is true that art. 60 of the Amendments to the Constitution of the Commonwealth expressly authorizing building zones in cities and towns does not apply to vacant lands, but it by no means follows that the uses of vacant lands cannot be regulated to a reasonable extent and in a reasonable manner for the promotion of the public health, safety, morals or welfare. This possibility, quite apart from art. 60, was, in effect, recognized in one of the very earliest judicial expressions on the subject, *Opinion of the Justices,* 234 Mass. 597, 602, 603, before the first zoning statute in this Commonwealth was enacted. See also *Brett* v. *Building Commissioner of Brookline,* 250 Mass. 73, 77. And the constitutionality of zoning statutes which have been held valid under the Federal Constitution and in many of the States does not depend upon art. 60 or upon any equivalent express constitutional provision."

Conceding, then, that a regulation of a mere use of land wholly apart from the use of structures thereon may in certain circumstances be proper, the significant question is how far a state may go in such regulation without violating the due process clause of the Federal Constitution.

The Supreme Judicial Court of Massachusetts in its opinion in the present case at pages 601 to 603 of the 1945 Massachusetts Advance Sheets has enumerated certain reasons to support the conclusion that the removal of loam and topsoil is a reasonable regulation of the use of land under zoning laws and that your petitioner may properly be enjoined. But no case involving the removal of loam or topsoil is cited by the Massachusetts court in support of this position save *Lexington* v. *Menotomy Trust Co.*, 304 Mass. 283, in which case the constitutional aspect of the question was not passed upon.

The cases cited by the Massachusetts Supreme Judicial Court to sustain a regulation of the right to remove loam from land are all cases involving the use of structures in connection with the removal of the component parts of the land or situations involving danger to the public welfare which could not possibly exist in the case of loam removal.

The Massachusetts Supreme Judicial Court points out at page 601 of the 1945 Advance Sheets that there is apt to be noise and dust in connection with the removal of the loam or topsoil. There is no evidence in the record of this fact nor is there any evidence that the removal of the loam would take a considerable period of time as stated in the opinion. As a matter of fact the loam could be removed in a very short space of time. The Town of Burlington in its bill of complaint claimed the existence of a nuisance, but the court was unable to find anything approaching the existence of a nuisance. The record shows that noise of a steam shovel coming from the general direction where the steam shovel of the defendants was operating was heard by two residents of the town who lived about one mile from the place of operation. There was no evidence of the extent or degree of this noise or that it actually came from the steam shovel of the defendants (Rec. p. 10). The rec-

ord also shows that for approximately the last twenty years the pit had been used for the removal of gravel and that the plaintiff town itself took gravel from that pit to repair its roads and carted the gravel away in trucks (Rec. p. 10).

The Massachusetts court also points out at page 601 that the soil is destroyed for agricultural uses. But while the soil at that particular place might be ruined for agricultural uses, the soil as such is not destroyed for agricultural purposes, nor does the regulation purport to be for agricultural purposes. Certainly the state would not have the right to prohibit a man from rendering his land useless for agricultural purposes until such time as it is shown that there would be no other soil which could be used to raise agricultural products to feed the people of the community. Every time a building is put up, the area occupied by the building necessarily is destroyed for agricultural purposes. When loam or topsoil is removed from a particular piece of land, the loam is moved to another place, which, if public necessity demanded, could be used for agricultural purposes. Until the removed soil is actually destroyed, it is still potential agricultural soil wherever it may be placed.

The Massachusetts Supreme Judicial Court speaks about the obligation and duty of towns to maintain roads by such premises after the loam has been removed, but cities and towns today are under obligation to maintain roads through many forests and field areas which have little or no value. The purposes of many of these roads are to enable commerce to take place between the various cities and towns and states and they are not maintained primarily for the benefit of a particular landowner. The fact that the town may wish to maintain roads for these purposes has nothing to do with the right of a particular property owner to use his land in any way that he wishes.

The Massachusetts Supreme Judicial Court at page 601 of the opinion speaks of the unsightly effect of the removal of the soil, and that is the crux of this case. This argument is based solely on aesthetic grounds and it has been many times held that aesthetic considerations are not sufficient basis for interference with property rights.

Welch v. *Swasey,* 214 U.S. 91.
St. Louis Poster Adv. Co. v. *St. Louis,* 249 U.S. 269.

As was said in *Nectow* v. *Cambridge,* 277 U.S. 183, 188:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

Plainly and obviously the prohibition of loam removal has no substantial relation to the public health, safety, morals or general welfare. Nor do the cumulative reasons set forth by the Massachusetts Supreme Judicial Court to justify the right of a city or town to prohibit loam removal of themselves justify the interference with the property rights of the petitioner to remove the loam or soil from their land.

Basically and fundamentally the objections to loam removal are that the land after the removal may be regarded as unsightly. That is the dominant reason cities and towns and your present respondent have tried to stop this loam removal. The basis of this objection is an aesthetic one pure and simple despite all arguments and

contentions to the contrary, and, as this Honorable Court and many other courts have said, such aesthetic considerations are not enough to interfere with the property rights of an individual.

Welch v. *Swasey,* 214 U.S. 91.
St. Louis Poster Adv. Co. v. *St. Louis,* 249 U.S. 269.
Varney & Green v. *Williams,* 155 Cal. 318.
Farist Steel Co. v. *Bridgeport,* 60 Conn. 278.
City of Sturgeon v. *Wabash Rwy. Co.,* 223 Mo. App. 633.
Cordts v. *Hutton Co.,* 146 Misc. 10, 262 N.Y.S. 539.
Bryan v. *Chester,* 212 Pa. 259.

The general welfare is not adversely affected by your petitioner's going on the premises and removing the loam or topsoil. This is not like an oil well, where there may be structures and fire hazards and noxious gases, or even a granite quarry, where explosives might be used. No important concern of the public welfare can possibly be advanced to deprive a landowner of the right to do with the loam and soil on his land what he desires. As was said in *Town of Harrison* v. *Sunny Ridge Builders,* 7 N.Y.S. (2d) 521, 522, where the court was directly passing on the rights of a landowner to remove topsoil:

> "It may be that such disposition of topsoil constitutes an unneighborly act, but whether the foregoing be true or not the court is bound to respect the rights of a landowner in his property."

Likewise, in *Town of Harrison* v. *Sunny Ridge Builders,* 8 N.Y.S. (2d) 632, the court, in considering an ordinance

passed by the Town of Harrison prohibiting the removal of loam, said at page 635 of its opinion:

> "First, is the ordinance last adopted prohibiting the removal of topsoil a valid exercise of police power? In my opinion it is not. It is not intended that its enforcement will promote either the public safety, health, morals or general welfare of the people of the town. The removal of topsoil from large acreages or plots immediately adjoining a residential section, otherwise highly restricted undoubtedly affects the aesthetic sense, but there seems to be a dearth of authority that statutes or ordinances can be passed when aesthetic reasons are their sole purpose. Not only does the ordinance prohibit the removal of topsoil but it prohibits the excavation or the removal of sand, stone, earth or gravel from any land in the town under certain conditions. The general proposition must still pertain in spite of the serious incursions made upon it by recent legislation that the owner of the property has a constitutional right to make any use of it that he desires so long as it does not affect the safety, health, comfort or general welfare of the community. It is not even contended here that the removal of the topsoil constitutes a nuisance. It has been held that an ordinance, to preserve the vista to private property, cannot be justified under the police power. . . . A statute prohibiting the excavation of sand, stone, gravel and topsoil of itself is an unconstitutional exercise of legislative power. See *Bartsch* vs. *Ragonetti,* 123 Misc. 903; 207 N.Y.S. 142, affirmed by App. Div. 214, App. Div. 799, 210 N.Y.S. 825; *People* vs. *Linabury,* 209 N.Y.S. 126. The authorities of other jurisdictions are consistent therewith, namely *Pennsylvania Coal Co.* vs. *Mahon,* 260 U.S. 393; *People* vs.

Hawley, 207 Cal. 395; *Stone* vs. *Kendall,* Tex. Cov. App. 268 S.W. 759; *Lamb* vs. *A. D. McKee, Inc.,* 10 N. J. Misc. 649."

The principles announced in the foregoing quotations are singularly applicable to the facts in the present case. As pointed out in the *Sunny Ridge Builders* case, the reasons for the objections to loam removal purely and simply are aesthetic, and as pointed out in that case such reasons are not sufficient to interfere with the right of a man to remove the loam from his premises. To deprive a man of his property rights for such a reason plainly violates the 14th Amendment to the Federal Constitution.

In addition the right of your petitioners to remove the loam and topsoil from their land is plainly established by the case of *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393. In that case this Honorable Court held that a state statute which forbade mining in such a way as to cause a subsidence of any human habitation or public street or building was unconstitutional as a violation of the due process clause of the 14th Amendment to the Federal Constitution. This decision has never been overruled, and while it did not concern a zoning law, the principles announced therein support the contention of your petitioners of their right to remove the loam and topsoil from their land.

Likewise, in *Village of Terrace Park* v. *Errett,* 12 Fed. (2d) 240, certiorari denied, 273 U.S. 710, a similar result was reached. It was there held that a zoning ordinance which prohibited the operation of a gravel pit in a residence area was unconstitutional as being in violation of the due process clause of the Federal Constitution. The Circuit Court relied upon the *Pennsylvania Coal Co.* case as authority for the result which it reached.

The foregoing decisions just cited present factual situations which are even less strong than the facts now before the court. In both the *Pennsylvania Coal Co.* case and the *Village of Terrace Park* case some structures were involved, but in the present case, as the record shows, your petitioners employ no structures whatever in removing the loam and topsoil.

An analysis of decisions from many other jurisdictions indicates that courts generally have vigorously guarded the right of a landowner to remove the component parts of his land, whether they be sand, gravel, loam or granite.

In the case of *In re Kelso,* 147 Cal. 609, it was held that the prohibition of a granite quarry was improper, as a taking of property without due process.

In the case of *In re Throop,* 169 Cal. 93, it was held that a granite quarry which turned out crushed stone could not be interfered with.

In *People* v. *Hawley,* 207 Cal. 395, it was held that excavating rock and gravel might not be interfered with. The court cited the *Pennsylvania Coal Co.* case in connection with the result which it reached.

In *Anderson* v. *Jester,* 206 Iowa, 452, the court held that the right to dig out the coal could not be arbitrarily interfered with. The *Pennsylvania Coal Co.* case was again cited.

In *Bartsch* v. *Ragonetti,* 123 Misc. 903, 207 N.Y.S. 142, affirmed 214 App. Div. 799, 210 N.Y.S. 825, it was held that a zoning regulation limiting the right to remove sand from property was unconstitutional.

In *People* v. *Linabury,* 209 N.Y.S. 126, it was held that a zoning ordinance depriving a property owner of the right to remove valuable material such as sand therefrom was unconstitutional as it deprived him of his property without compensation.

In *Stone* v. *Kendall* (Tex. Civ. App.) 268 S.W. 759, it was held that an ordinance prohibiting excavating within a municipality for the purpose of removing dirt or gravel or any other natural substance was unenforceable, as arbitrary and an unwarranted limitation on the lawful use of private property.

It is true that in the case of *Marblehead Land Co.* v. *City of Los Angeles,* 47 Fed. (2d) 528, certiorari denied, 284 U.S. 634, a divided court reached a result which imposed some limitations on the right of a landowner to remove the component parts of his land. In that case it was held that a zoning ordinance declaring oil-well drilling operations illegal within certain residence areas, which repealed a former ordinance excepting such land from the district, was valid. So far as the principles announced in this case may be applicable in the case at bar, it may be first pointed out that oil-well drilling necessarily involves the use of structures. This fact would immediately distinguish that case from the case at bar. Also the considerations of public welfare involved in connection with a regulation of oil drilling do not remotely exist in the case of loam removal. The danger of fire from oil wells as well as the existence of noxious gases is obvious and is a consideration which might well prompt the result which was reached in the *Marblehead Land Co.* case. It may further be noted that in the *Marblehead Land Co.* case the majority discussed *Pennsylvania Coal Co.* v. *Mahon* without really distinguishing it in any way. The dissent in this case relies on the *Pennsylvania Coal Co.* case.

The importance of this decision in the *Pennsylvania Coal Co.* case is at once apparent and is one of the primary bases for the petition in the present case.

The case of *Laurel Hill Cemetery* v. *San Francisco,* 216 U.S. 358, does not militate against the contention of your

present petitioners. That case involved a regulation of a cemetery in a city, and manifestly considerations of health were the basis for the decision. No such factors enter into the case at bar.

Hadacheck v. *Los Angeles,* 239 U.S. 394, likewise is distinguishable from the present case. In that case it was held that an ordinance prohibiting the manufacturing of bricks within a specified section of a municipality was a constitutional exercise of the police power, but the significant point in connection with that case to be noted is that the court definitely raised the question whether the city could prohibit the digging of clay from the land and moving it to another place to be manufactured into brick. The court clearly suggested that the prohibition of the mere digging of the clay and moving it from the land would be an unconstitutional deprivation of property without due process of law.

In the light of the foregoing authorities and particularly the case of *Pennsylvania Coal Co.* v. *Mahon* it seems that to construe the zoning by-law in the present case to prohibit the removal of loam and soil by your petitioners is an unconstitutional exercise of the police power. It is apparent from the opinion of the Massachusetts Supreme Judicial Court and in the light of the facts of the record that the result which was reached was based fundamentally on aesthetic considerations, and those, it is well established, are plainly not enough to restrict a person from the use of his property.

This Honorable Court, therefore, should now pass finally and authoritatively on the basic question involved in this case, which is: May a state interfere with the property rights of an individual where the basic reasons for such interference are purely aesthetic?

VI.
Conclusion.

In accordance with the foregoing authorities and for the reasons stated, it is urged that the writ of certiorari should issue, in order that a full and authoritative decision by this Honorable Court may resolve this important question.

Respectfully submitted,

JOHN H. DEVINE,
FRANK G. VOLPE,
Attorneys for Petitioners.

Of Counsel:
DEVINE, YORK & VOLPE,
J. RAYMOND SPENCE.